Filed 6/13/19 Ocean Tomo, LLC v. PatentRatings, LLC CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

OCEAN TOMO, LLC, Plaintiff, Cross-defendant and Appellant, v. PATENTRATINGS, LLC et al., Defendants, Cross-complainants and Respondents.	G055429 (consol. with G056063, G056829) (Super. Ct. No. 30-2014-00730938) O P I N I O N

Appeals from a judgment and postjudgment orders of the Superior Court of Orange County, Nathan R. Scott, Judge. Affirmed. Respondents' motion for judicial notice. Denied. Appellant's request for judicial notice. Denied.

Buchalter, Michael L. Meeks, Robert M. Dato and Brandon Q. Tran for Plaintiff, Cross-defendant and Appellant.

O'Neil and William E. Halle for Defendant, Cross-complainant and Respondent PatentRatings, LLC.

Brown Rudnick and Leo J. Presiado for Defendant, Cross-complainant and Respondent Jonathan Barney.

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INTRODUCTION

PatentRatings, LLC (PatentRatings) issued a capital call to its members to fund litigation with Ocean Tomo, LLC (Ocean Tomo), which also happened to be a PatentRatings' member and minority owner. Ocean Tomo refused to pay its share of the capital call, and this litigation ensued. Following a bench trial, the court entered judgment in favor of PatentRatings and its majority owner, Jonathan Barney, and against Ocean Tomo. Ocean Tomo appeals from the judgment and two postjudgment awards of attorney fees to Barney. We affirm.

At trial, Ocean Tomo bore the burden of proving (1) litigation expenses were not part of PatentRatings' operating expenses, and (2) the PatentRatings' manager owed a fiduciary duty to its members, including Ocean Tomo. Substantial evidence supported the trial court's findings that Ocean Tomo had failed to carry its burden of proof. To the contrary, substantial evidence supported a finding that litigation expenses were part of PatentRatings' operating expenses, and that Barney, as a manager, pursuant to Corporations Code section 17704.09 and the terms of the PatentRatings' Operating Agreement, did not owe a fiduciary duty to PatentRatings' members. The trial court did not err in awarding contractual attorney fees to Barney; Barney participated in mediation before this action was filed and was not required to participate in further mediation sessions before filing cross-claims against Ocean Tomo.

STATEMENT OF FACTS

Barney is the founder, majority owner, and senior manager of PatentRatings. Barney created a software product to statistically analyze, rate, and value patents; PatentRatings was created to commercialize this product. In December 2004, Barney, PatentRatings, and Ocean Tomo entered an Equity Exchange Agreement, by which Ocean Tomo obtained a 25 percent interest in PatentRatings and a limited exclusive license to the software.[1]

Despite early success, the relationship between PatentRatings and Ocean Tomo soured. In February 2011, Ocean Tomo filed a demand for arbitration against PatentRatings based on alleged breaches of contract. Following a hearing, a three-arbitrator panel of the American Arbitration Association denied Ocean Tomo's claims.

Ocean Tomo also filed two different lawsuits against Barney and PatentRatings in Illinois. In the first case, Ocean Tomo alleged that Barney had breached his employment agreement with and his fiduciary duties to Ocean Tomo by using, copying, and destroying Ocean Tomo's confidential and trade secret information. Ocean Tomo also alleged that PatentRatings and Barney had tortiously interfered with Ocean Tomo's business relations. After PatentRatings gave Ocean Tomo notice of breach under the parties' license agreement due to Ocean Tomo's alleged failure to pay royalties, Ocean Tomo responded by filing another lawsuit in Illinois state court seeking a declaration that it had not breached the license agreement. The two Illinois state court cases were consolidated before the United States District Court for the Northern District of Illinois. PatentRatings and Barney filed a cross-complaint against Ocean Tomo for breaches of contract in the consolidated action.

In 2012 and 2013, Barney personally made interest-free loans to PatentRatings, totaling $135,000. PatentRatings repaid the loans in February 2014.

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[1] During the relevant period, the ownership of PatentRatings was as follows:

Jonathan Barney:	63.83 percent
James Barney:	5.00 percent
John Gentry:	1.50 percent
Maynard Carkhuff:	1.50 percent
The Yoram Benbarak Trust:	2.33 percent
The Ora Benbarak Trust:	0.83 percent
Ocean Tomo:	25.00 percent

At a February 2014 board meeting, the PatentRatings' board of members approved a capital call on the members. All members, with the exception of Ocean Tomo, timely paid their shares of the capital call. In December 2014, Barney deposited $100,000 in PatentRatings' bank account, designated as a loan to Ocean Tomo to cover Ocean Tomo's portion of the capital call. To date, the loan has not been reimbursed.

PROCEDURAL HISTORY

Ocean Tomo sued Barney and PatentRatings in June 2014, after the parties were unsuccessful resolving their disputes through mediation. Ocean Tomo asserted derivative claims on behalf of PatentRatings against Barney for declaratory relief and breach of fiduciary duty, and its own claims against Barney for breach of fiduciary duty and against PatentRatings for declaratory relief. Both PatentRatings and Barney filed cross-complaints for breach of contract against Ocean Tomo to force Ocean Tomo to make the contributions required by the capital call.

Following a bench trial, the court found in favor of Barney and PatentRatings and against Ocean Tomo on all claims and cross-claims. The court issued a statement of decision[2] and entered judgment.

The trial court granted motions for contractual attorney fees filed by Barney and PatentRatings, and later granted motions for further attorney fees by those same parties.

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[2] PatentRatings and Barney submitted a proposed statement of decision, to which Ocean Tomo filed objections. The trial court overruled all of Ocean Tomo's objections. The proposed statement of decision did not include a signature line for the trial court's signature. Therefore, the court adopted the statement of decision in a minute order, pursuant to Code of Civil Procedure section 632.

Ocean Tomo appealed from the judgment and from the postjudgment orders awarding attorney fees. This court consolidated the three appeals.[3]

DISCUSSION

I.

THE TRIAL COURT PROPERLY ENTERED JUDGMENT IN FAVOR OF BARNEY AND PATENTRATINGS.

"Where the court issues a statement of decision, it need only recite ultimate facts supporting the judgment being entered. [Citation.] If the judgment is supported by factual findings based on substantial evidence, the reviewing court affirms. [Citation.] Conflict in the evidence is of no consequence." (*People v. Orange County Charitable Services* (1999) 73 Cal.App.4th 1054, 1071.) "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court*

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[3] Barney and PatentRatings filed a request for judicial notice of five documents filed in other litigation matters between Ocean Tomo and PatentRatings. All are documents that are proper subjects of permissive judicial notice. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) However, none of these documents was before the trial court, and all but one postdate the trial of this matter. None of these documents is relevant to the issues presented by this appeal. Therefore, we deny Barney and PatentRatings' joint request for judicial notice.

Ocean Tomo also filed a request for judicial notice of a document filed in the consolidated federal case in Illinois. This document, too, postdates the trial of the present matter. Ocean Tomo's request for judicial notice makes clear that its request is made solely to counter the materials of which Barney and PatentRatings seek judicial notice. We also deny Ocean Tomo's request for judicial notice.

believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

A.

The Trial Court Did Not Err in Finding that Legal Fees for Litigating Against Ocean Tomo Were Operating Expenses under the Operating Agreement.

On the fourth cause of action for declaratory relief, the trial court found: "Ocean Tomo failed to show the capital call was invalid. Ocean Tomo failed to show the capital call was used to repay the Barney loans and pay litigation expenses and, even if it had, it failed to show those expenditures would not constitute 'operating expenses.'"

Because Ocean Tomo has not addressed on appeal the first two findings, namely that (1) it failed to show the capital call was invalid, and (2) it failed to show the capital call was used to pay litigation expenses, it arguably has waived its right to challenge the third finding, that the litigation expenses were not operating expenses.

We nevertheless will address Ocean Tomo's argument regarding litigation expenses as operating expenses, and conclude the trial court's finding was supported by substantial evidence. The Operating Agreement provides that PatentRatings can make a mandatory capital call on members as follows: "8.3 Required Contributions – All Members. If required in the discretion of the Managers, the Members will be required to make additional Capital Contributions to the Company to meet operating expenses of the Company within thirty (30) days from the date of written notice by the Managers. Any required Capital Contribution shall be made pro rata, in accordance with the Members' Percentage Interests unless otherwise agreed to by all Members in writing." The term "operating expenses" is not defined in the Operating Agreement.

"The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country*

Club, Inc. (2003) 109 Cal.App.4th 944, 955.) "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (Civ. Code, § 1644.)

As detailed *post*, the trial court admitted extrinsic evidence of the meaning of "operating expenses" vis-à-vis litigation expenses. "Extrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible. [Citations.] If the trial court decides, after receiving the extrinsic evidence, the language of the contract is reasonably susceptible to the interpretation urged, the evidence is admitted to aid in interpreting the contract. [Citations.] Thus, '[t]he test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.' [Citation.] [¶] The threshold issue of whether to admit the extrinsic evidence—that is, whether the contract is reasonably susceptible to the interpretation urged—is a question of law subject to de novo review. [Citations.] [¶] . . . When the competent extrinsic evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction will be upheld if it is supported by substantial evidence." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc., supra*, at pp. 955-956.)

The purpose of the capital call was to ensure PatentRatings' ability to fund ongoing litigation and arbitration in which it was involved. Barney testified that if the capital call had not been made, "[t]he company would not have had sufficient resources to defend itself [i]n the ongoing litigations with Ocean Tomo or to pursue it's [*sic*] counter-claims in its litigations against Ocean Tomo."

PatentRatings is a technology company with four main aspects to its technology: (1) a ratings algorithm that makes predictions regarding the value of a patent by looking at 40 to 50 unique factors; (2) a large database of information regarding the ownership of existing patents; (3) “a special light[n]ing searching algorithm called a relevance agent” that identifies patents based on how they are cited by other patents; and (4) a “multi-generational citation tree and algorithm” that identifies those patents most relevant to a specified patent. PatentRatings sells reports to large companies to help them maintain their own patent portfolios and to identify their competitors’ patent assets. PatentRatings’ balance sheets reflect the following as assets: (1) petty cash and checking account; (2) computer equipment; and (3) patents and patent applications.

PatentRatings was required to defend against the arbitration initiated by Ocean Tomo because it could not have paid the amount being demanded; the expenses of defending itself in that action were in excess of $400,000.

PatentRatings was required to defend itself in the two Illinois state court cases to avoid default judgment and to recover its license rights and sell those rights to other companies. PatentRatings was required to indemnify Barney for his expenses in the litigation incurred as a result of his work as a manager for PatentRatings. After the two Illinois state court cases were consolidated in the Illinois federal court, Ocean Tomo filed a motion for summary judgment seeking to invalidate several of PatentRatings’ patents. PatentRatings was required to defend against that motion because failure to do so would have caused PatentRatings to lose its patents, “and we would have had most of our assets wiped out.”[4]

The minutes of the February 2014 meeting of the PatentRatings’ board of members reflect that when one member representing Ocean Tomo “objected to the capital call on the grounds that litigation expenses cannot properly be considered an ‘operating expense’ of the Company,” two other members “pointed out that litigation expenses are

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[4] The trial court did not admit the order denying the summary judgment motion into evidence, but Barney’s testimony regarding the potential outcome to PatentRatings if the motion had been granted was not stricken.

typically treated as operating expenses." PatentRatings' profit and loss statements listed legal expenses as a subcategory under ordinary expenses. Barney testified that the profit and loss statements were provided to Ocean Tomo at or about the time they were prepared, and no one at Ocean Tomo ever objected to the characterization of legal fees as ordinary expenses.

PatentRatings also offered evidence that litigation expenses are generally recognized as operating expenses. J. Michael Issa testified as an expert witness on behalf of PatentRatings on, among other things, the "characterization of PatentRatings' legal expense[s]." Issa's opinion on that topic was as follows: "My view . . . is there is considerable professional authority in support of the proposition that legal expenses are treated as operating expenses." Issa's opinion was based, in part, on written recommendations by Price Waterhouse and the Financial Accounting Standards Board that litigation expenses should generally be recorded as operating expenses, and are neither unusual nor infrequent, meaning they do not qualify as extraordinary expenses. Issa also testified that litigation in the patent licensing industry is neither infrequent nor unusual, meaning that litigation expenses should be categorized as ordinary not extraordinary expenses. Further, litigation was not infrequent or unusual for PatentRatings itself.

Issa rejected the opinion of Ocean Tomo's designated expert that "this litigation is a one-time event, that it does not particularly have anything to do with the future o[r] financial well-being of PatentRatings and, therefore, it's unusual and infrequent and shouldn't be accounted for as an operating expense." Issa also looked at the financial statements of several public companies involved in intellectual property litigation, and found that "[e]very company we looked at that had ongoing IP litigation accounted for it as an operating expense in their statement of operations in the 10K."

The evidence of industry practice, accounting recommendations, and PatentRatings' custom was admissible to prove a meaning of the term operating expenses to which the Operating Agreement is reasonably susceptible, and therefore was properly admitted.[5]

The evidence before the trial court was that PatentRatings classified litigation expenses as operating expenses; PatentRatings would not have been able to continue as an ongoing entity if it had not defended itself against the arbitration and the litigation initiated against it by Ocean Tomo; PatentRatings' classification of litigation expenses as operating expenses was consistent with professional guidelines on the issue; and PatentRatings' classification of litigation expenses as operating expenses was consistent with the practice of public companies involved in intellectual property litigation. The trial court's finding that Ocean Tomo had failed to establish PatentRatings' litigation expenses were not operating expenses was amply supported by substantial evidence.

B.

The Trial Court Did Not Err by Failing to Address Whether PatentRatings' Board of Members Independently Assessed the Reasonableness of and Need for the Capital Call.

Ocean Tomo next argues that this court must remand the matter to the trial court to determine whether PatentRatings' board of members independently assessed the reasonableness of and need for a capital call.

PatentRatings initially argues that this issue is not properly raised on appeal. Ocean Tomo's request for a statement of decision does not identify this issue as controverted. Ocean Tomo did not raise the trial court's alleged failure to resolve this issue through objection to what became the court's statement of decision. "[U]nder [Code of Civil Procedure] section 634, the party must state any objection to the statement in order to avoid an implied finding on appeal in favor of the prevailing party. The

[5] The testimony of Ocean Tomo's expert witness was also properly admitted on the same ground. Once both experts' testimony was admitted, the trial court weighed that evidence and made its ruling in PatentRatings' favor.

section declares that if omissions or ambiguities in the statement are timely brought to the trial court's attention, the appellate court will not imply findings in favor of the prevailing party. The clear implication of this provision, of course, is that if a party does not bring such deficiencies to the trial court's attention, that party waives the right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment. Furthermore, [Code of Civil Procedure] section 634 clearly refers to a party's need to point out deficiencies in the trial court's statement of decision as a condition of avoiding such implied findings, rather than merely to request such a statement initially as provided in [Code of Civil Procedure] section 632." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134, fn. omitted.)

In reply, Ocean Tomo does not deny that it did not raise the issue in the request for a statement of decision or in its objections to the statement of decision. Instead, Ocean Tomo cites the following:

(1) Ocean Tomo's first amended complaint alleged Barney and PatentRatings acted for the benefit of Barney and to the detriment of Ocean Tomo, and requested that the trial court declare the capital call invalid; and

(2) Ocean Tomo's representative on PatentRatings' board of members requested that PatentRatings provide a litigation budget and hire independent counsel to assess the litigation; PatentRatings refused both requests.

Even if we were to consider this issue on its merits, Ocean Tomo has failed to cite us to any evidence that PatentRatings' board of members had any duty to independently assess the need for a capital call. The Operating Agreement provides to the contrary regarding required capital contributions: "*If required in the discretion of the Managers*, the Members will be required to make additional Capital Contributions to the Company to meet operating expenses of the Company within thirty (30) days from the date of written notice by the Managers." (Italics added.) Thus, the Operating Agreement provides that it is the managers who decide whether the capital call is necessary, and the members are thereafter required to make their pro rata contributions. The board of members was not required, nor did it have the authority, to independently assess the reasonableness of and need for the capital call.

C.

The Trial Court Did Not Err in Finding that Barney, as PatentRatings' Manager, Did Not Owe a Fiduciary Duty to Ocean Tomo as a PatentRatings' Member.

Ocean Tomo challenges the trial court's finding that Ocean Tomo failed to establish that Barney owed a fiduciary duty to Ocean Tomo as a majority owner of PatentRatings. The factual basis for this finding is that Ocean Tomo had not alleged that Barney, as a manager, owed it a fiduciary duty. The legal basis for this finding was the Corporation Code's provision that "members of manager-managed LLCs owe no fiduciary duty to other members."

Ocean Tomo begins its analysis by arguing that the proper standard of review is de novo because "[t]he adequacy and interpretation of a complaint is reviewed de novo." Ocean Tomo supports this argument with citations to opinions considering demurrers and motions for judgment on the pleadings. The present appeal arises from a judgment after trial, not from a judgment after a ruling on a challenge to the pleadings.

Even if this argument were procedurally correct, it lacks merit. Ocean Tomo points to paragraph 37 of its complaint: "By engaging in the foregoing conduct, Barney breached his fiduciary duty to PatentRatings by using the entity's funds for his personal benefit." This allegation is not made in connection with the cause of action for breach of fiduciary duty by Barney as a majority owner to Ocean Tomo as a minority owner, but rather in connection with a separate cause of action for breach of fiduciary duty filed by Ocean Tomo derivatively on behalf of PatentRatings. In connection with this derivative claim for breach of fiduciary duty, the trial court found, in part, that Ocean Tomo lacked standing to assert the claim. Ocean Tomo has not challenged on appeal the trial court's findings on that cause of action.

The trial court also found that Corporations Code section 17704.09, subdivision (f)(1) and (3) provides that "members of manager-managed LLCs owe no fiduciary duty to other members."

Corporations Code section 17704.09 provides: "(a) The fiduciary duties that a member owes to a member-managed limited liability company and the other members of the limited liability company are the duties of loyalty and care under subdivisions (b) and (c).

"(b) A member's duty of loyalty to the limited liability company and the other members is limited to the following: [¶] (1) To account to the limited liability company and hold as trustee for it any property, profit, or benefit derived by the member in the conduct and winding up of the activities of a limited liability company or derived from a use by the member of a limited liability company property, including the appropriation of a limited liability company opportunity. [¶] (2) To refrain from dealing with the limited liability company in the conduct or winding up of the activities of the limited liability company as or on behalf of a person having an interest adverse to the limited liability company. [¶] (3) To refrain from competing with the limited liability company in the conduct or winding up of the activities of the limited liability company.

"(c) A member's duty of care to a limited liability company and the other members in the conduct and winding up of the activities of the limited liability company is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

"(d) A member shall discharge the duties to a limited liability company and the other members under this title or under the operating agreement and exercise any rights consistent with the obligation of good faith and fair dealing.

"(e) A member does not violate a duty or obligation under this article or under the operating agreement merely because the member's conduct furthers the member's own interest.

"(f) In a manager-managed limited liability company, all of the following rules apply: [¶] (1) Subdivisions (a), (b), (c), and (e) apply to the manager or managers and not the members. [¶] (2) Subdivision (d) applies to the members and managers. [¶] (3) *Except as otherwise provided, a member does not have any fiduciary duty to the limited liability company or to any other member solely by reason of being a member*." (Corp. Code, § 17704.09, italics added.)

The Operating Agreement is consistent with Corporations Code section 17704.09. The Operating Agreement provides that "[t]he Managers will not owe a fiduciary duty to the Company *or to any Member*. The Managers will owe a duty of loyalty and a duty of care to the Company." (Italics added.)

In addition to its finding that Barney owed no fiduciary duty to Ocean Tomo as a majority member, the trial court also addressed the two specific grounds raised in Ocean Tomo's second cause of action for breach of fiduciary duty. The court found that Ocean Tomo had failed to show Barney owed it a specific fiduciary duty (1) to cause PatentRatings to not repay the loans Barney had made to PatentRatings, and (2) not to use PatentRatings' funds to pay Barney's legal fees. These findings were supported by substantial evidence that (1) the approval of the loans to Barney was consistent with the Operating Agreement and was not wrongful; the loans were based on consideration; and the loans did not disadvantage PatentRatings; and (2) Barney paid all legal expenses attributable to his personal matters; it was reasonable and proper for PatentRatings to pay for legal fees incurred by Barney in connection with actions undertaken as PatentRatings' manager; and PatentRatings' board of members reviewed all legal invoices to ensure PatentRatings was not paying Barney's individual legal expenses.

The cases Ocean Tomo cites are inapposite. *Credit Managers Assn. v. Superior Court* (1975) 51 Cal.App.3d 352, 361 and *Solon v. Lichtenstein* (1952) 39 Cal.2d 75, 82, hold that when the parties are in a confidential relationship, the burden is on the fiduciary to prove it did not act in violation of its fiduciary duty. As explained *ante*, however, the trial court found that Ocean Tomo failed to prove the existence of a fiduciary duty by Barney to Ocean Tomo. Therefore, no burden to justify Barney's conduct ever arose.

Ocean Tomo concludes its argument on this point by summarizing the evidence of Barney's breaches of his alleged fiduciary duty, and asks that the case be remanded with directions to the trial court to consider the evidence. The trial court had this evidence before it, and found Ocean Tomo failed to prove the existence of either a general or a specific fiduciary duty to Barney by Ocean Tomo. This issue has been fully considered and resolved.

II.

THE TRIAL COURT PROPERLY AWARDED ATTORNEY FEES TO BARNEY.

Ocean Tomo argues that the awards of attorney fees to Barney must be reversed because Barney failed to mediate his claims.[6] Ocean Tomo asked the trial court to reduce the initial attorney fees award to Barney by $6,319, representing the amount attributable solely to Barney's cross-claim, and a further $42,634.29, representing a prorated portion of the attorney fees indirectly attributable to the cross-claim. Ocean Tomo does not specify how much of the second attorney fees award it claims is attributable to Barney's cross-claim, and should therefore be disallowed.

Section 19.4 of the Operating Agreement provides as follows regarding attorney fees: "Subject to provisions of Article 18, in the event a dispute arises between any Member(s) and the Company or between the Members themselves, the prevailing

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[6] The trial court initially ordered Ocean Tomo to pay $359,214 to Barney, and $258,314.38 to PatentRatings "for their reasonable, reasonably necessary attorney fees incurred in this action." Several months later, the court granted a motion for further attorney fees, and ordered Ocean Tomo to pay an additional $16,599 to Barney and $20,111.25 to PatentRatings. Ocean Tomo makes the same argument with respect to both attorney fee awards.

party shall be entitled to recover reasonable attorney's fees and court costs incurred." Article 18 of the Operating Agreement addresses the parties' respective duties to mediate any disputes before filing a lawsuit. Specifically, section 18.1 provides that members "pledge to attempt to resolve any dispute amicably without the necessity of litigation."

The trial court held: "Barney sufficiently shows his compliance with the Operating Agreement's mediation provisions, to whatever extent those provisions condition an attorney fee award on completing pre-dispute mediation."

Despite Ocean Tomo's argument to the contrary, *Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1508 does not assist it. In *Frei v. Davey,* we held that a party may not recover attorney fees if that party failed to comply with a contractual provision making attorney fees contingent on participating in mediation before commencing litigation. The relevant contractual provision in *Frei v. Davey* provided: "'If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney's fees, even if they would otherwise be available to that party in any such action.'" (*Id.* at p. 1509.) PatentRatings members' "pledge to attempt" to resolve disputes amicably before initiating litigation is not the same as the mandatory mediation language of *Frei v. Davey*.

Most importantly, even if mediation was required, the parties did engage in mediation before Ocean Tomo filed the present lawsuit. Ocean Tomo's complaint states that Barney was present at the mediation sessions. Ocean Tomo's challenge to the attorney fees awards now is that, before Barney asserted cross-claims several months later, he failed to pursue additional attempts at mediation. The trial court did not err in finding that Barney was not required to attempt additional alternative dispute resolution before filing his cross-claims.

DISPOSITION

The judgment is affirmed. The postjudgment orders awarding attorney fees are affirmed. Respondents to recover costs on appeal.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.